Supreme Court of the United States

OCTOBER TERM, 1963

No. 33

ARABIAN AMERICAN OIL COMPANY,

Petitioner,

against

HOWARD FARMER,

Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Arabian American Oil Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for review of the judgment entered in the above titled action on November 6, 1963.

Howard Farmer, respondent here, has filed a petition, dated February 3, 1964, for a writ of certiorari to the United States Court of Appeals for the Second Circuit, for review of the same judgment, copies of which were served on petitioner here, as respondent, on January 31, 1964.

Your petitioner cross-petitions for the granting of a writ of certiorari.

Opinions Below.

The two opinions of Judge Edmund L. Palmieri of the United States District Court, Southern District of New York, awarding costs in favor of petitioner, may be found at pages 31a and 37a of the Record. The opinion of Judge Edward Weinfeld of the United States District Court, Southern District of New York, awarding costs in favor of petitioner, is reported at 31 F. R. D. 191 and may be found at page 59a of the Record. The opinion in the Court of Appeals for the Second Circuit reversing and remanding to allow certain of the costs taxed by Judge Palmieri, plus those items taxed by Judge Weinfeld, is reported at 324 F. 2d 359 and may be found at page 74a of the Record.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered November 6, 1963. (Appendix A, pages A1 and A2)

The statutory provision conferring jurisdiction on this court is found at 28 U. S. C. §1254(1).

Question Presented.

May a trial judge take account of the relative financial resources of the parties and the ability of the unsuccessful litigant to bear the costs of litigation in awarding such costs pursuant to 28 U. S. C. §1920 and Rule 54(d) of the Federal Rules of Civil Procedure?

Statutes Involved.

Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §§1821 and 1920 are set forth at pages B-1 and B-2 of appendix.

Statement of the Case.

Respondent commenced this action in the Supreme Court of the State of New York, New York County. The action was removed by defendant to the United States District Court of the Southern District of New York upon the grounds of diversity of citizenship of the parties and the involvement of the required jurisdictional amount.

Respondent, an ophthalmologist, sued petitioner for $160,000[1] on the ground that petitioner terminated respondent's employment prior to the end of the term for which respondent alleged he was employed. He claimed that he was discharged by petitioner for truthfully reporting alleged findings that many American employees were contracting trachoma, a tropical disease which may lead to blindness and that his superiors sought to intimidate him into suppressing his findings. Petitioner, to the contrary, introduced evidence that respondent was employed at will and that respondent was discharged for good cause for his violation of an express rule of petitioner's hospital and accepted standards of medical practice in performing an operation on a four year-old patient.

The case was tried before the Honorable Edmund L. Palmieri and a jury resulting in a disagreement among the jury. Judge Palmieri dismissed the complaint on legal grounds (176 F. Supp. 45). Costs of $6,601.08 were then

[1] Increased from $4,000 on June 17, 1960.

awarded to petitioner. The award included the expense entailed by petitioner in bringing certain witnesses from Saudi Arabia. The witnesses were necessary to rebut respondent's contention.

Judge Palmieri's decision, dismissing the complaint, was reversed by the Court of Appeals, 277 F. 2d 46, and the case was remanded for a new trial. A writ of certiorari was denied by this Court (364 U. S. 824).

Prior to the second trial petitioner made a motion to require respondent to post a bond for costs. The motion was granted by the Honorable Richard H. Levet of the District Court, Southern District of New York. Thereafter the action was dismissed by the Honorable Lloyd F. MacMahon of the District Court, Southern District of New York, for respondent's failure to post the required bond. The Court of Appeals reversed the decisions of these two district judges. 285 F. 2d 720 at 722.

The case was retried before the Honorable Edward Weinfeld and a jury. A verdict was returned for petitioner.

The Clerk of the court thereafter taxed costs of $11,900.12 for petitioner's expenses on both the first and second trials. On motion by respondent, Judge Weinfeld disallowed a substantial portion of these costs, including costs awarded to petitioner by Judge Palmieri in the first trial, and limited petitioner's costs to $831.60. With regard to transportation from Saudi Arabia, Judge Weinfeld held that petitioner could recover no costs for witnesses who rode on petitioner's planes, maintained and operated by it, and could recover costs for only the last one hundred miles of the journey of witnesses flown in on commercial airlines.

Judge Weinfeld's opinion refers to the "great disparity in the financial resources of the parties" and he apparently limited petitioner's recovery of costs on the ground that petitioner was a "rich litigant."

The Court of Appeals, sitting in banc, reversed and remanded Judge Weinfeld's determination of costs by a 5-4 decision. The majority held "the 100-mile rule inapplicable as a restraint upon the exercise of judicial discretion in the assessment of transportation costs for witnesses brought to trial," and that "Judge Weinfeld should have deferred to Judge Palmieri with respect to those costs incurred in the first trial."

Chief Judge J. Edward Lumbard of the Court of Appeals stated (page A-7 of appendix to petition of Farmer):

> "We do not hold that the full measure of travel expenses *must* be taxed against the unsuccessful party in each and every cause; we merely affirm the *power* of a federal district judge to exercise his discretion in the allocation of such costs. In exercising that discretion, the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful litigant to bear the costs of the litigation, where the action has been prosecuted in all good faith. It is only under such a rule that the impecunious litigant may be assured of his right to present effectively his case to judge and jury."

By this statement the Court of Appeals apparently affirmed that if, as appears from Judge Weinfeld's opinion, Judge Weinfeld limited petitioner's costs on the basis that petitioner was a "rich litigant", this did not constitute an abuse of discretion.

While the majority held that the discretion of Judge Palmieri as to the costs on the first trial should have been respected, they disallowed the costs awarded by Judge Palmieri for two material witnesses who were paid no costs for their travel and lodging and were flown in from Saudi Arabia on petitioner's planes in seats that otherwise would have been vacant. These planes were owned, maintained and operated by petitioner at substantial expense. The charges allocated by petitioner for their transportation was substantially less than the lowest first-class rate available. The Honorable Charles E. Clark dissented from this holding, stating:

> "* * * Except on the theory that two wrongs make a right, this cannot be justified, for it is settled on the authorities that costs for witnesses legally due are taxable, whether they have been paid to the witness or not. The taxing authority cannot be expected to go into the issue whether the witness may not have appeared voluntarily, making no claim for fees."

The overwhelming weight of authority supports Judge Clark's position. See, *e.g., Vincennes Steel Corporation* v. *Miller*, 94 F. 2d 347, 349 (C. A., 5th Cir. 1938); *Spiritwood Grain Co.* v. *Northern Pac. Ry. Co.*, 179 F. 2d 338, 344 (C. A., 8th Cir. 1950); *Kemart Corporation* v. *Printing Arts Research Lab.*, 232 F. 2d 897, 901, 902, 904, 905 (C. A., 9th Cir. 1956).

Reasons for Granting the Writ.

1. The position of the Court of Appeals, that relative financial resources of litigants can be weighed in awarding costs, raises fundamental questions in the interpretation

of Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §1920.

2. In principle at least, the position of the Court of Appeals in this respect is in direct conflict with decisions of courts of appeal for other circuits. *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (C. A., 7th Cir. 1949), *cert. denied* 338 U. S. 948 (1950); *Lichter Foundation* v. *Welch*, 269 F. 2d 142 (C. A., 6th Cir. 1959).

3. Fundamental questions in the administration of justice in the federal courts are raised by the denial of costs to the richer of two litigants because of wealth.

4. The position of the Court of Appeals will endanger the longstanding policy of this Court toward encouraging settlements and discouraging "strike suits".

Argument in Support of Reasons.

1. It has long been the general rule that the successful party is entitled to costs, "which are allowed to the successful party by way of amends for his expense and trouble in prosecuting [or defending] his suit." *Day* v. *Woodworth*, 13 How. (54 U. S.) 363, 372 (1851); 6 MOORE'S FEDERAL PRACTICE, §54.70 [3], p. 1304 (2nd Ed.)

Prior to the Federal Rules of Civil Procedure, in the absence of a statutory provision otherwise providing, the prevailing party in an action at law was entitled to costs as of right. *Ex parte Peterson*, 253 U. S. 300, 317, 318 (1920); 6 MOORE §54.70 [3], p. 1340. With the promulgation of Rule 54(d) of the Federal Rules of Civil Procedure, the trial judge was given discretion under 28 U. S. C. §1920, to allow or disallow costs to the prevailing party.

A fundamental and novel question as to the proper exercise of this statutory discretion has been raised by the

position, adopted by the Court of Appeals for the Second Circuit, that the relative financial resources of litigants are to be considered in awarding costs. Other circuits have never interpreted Rule 54(d) or 28 U. S. C. §1920 to hold that the fact that a successful defendant is sued by a less rich plaintiff is proper grounds to deny the defendant his costs. Cf. *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (C. A., 7th Cir. 1949), *cert. denied* 338 U. S. 948 (1950); *Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142, 146 (C. A., 6th Cir. 1959).

It is respectfully submitted that the interpretation placed on Rule 54(d) and 28 U. S. C. §1920 by the Court of Appeals is erroneous and should be reversed.

2. Heretofore federal courts have adhered to the position that "departure from the rule of awarding costs to the prevailing party should only be for good cause." 10 CYCLOPEDIA OF FEDERAL PROCEDURE, §38.17, p. 377 (3rd Ed.). Only where the prevailing party has been guilty of some improper conduct in the course of the litigation have costs been denied. As stated by the Honorable Otto Kerner in *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (1949), *cert. denied* 338 U. S. 948 (1950):

> "While there is no question that, under Rule 54(d), Rules of Civil Procedure, 28 U. S. C. A. which provides: 'Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; * * *' the court has discretion over the allowance of costs, we think the facts disclosed did not justify the exercise of that discretion. *As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his*

> *part in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case.* [citations omitted] *A party, although prevailing, would be denied costs for needlessly bringing or prolonging litigation."* (Emphasis added.)

There has been no contention here that the witnesses called by petitioner were unnecessary or that their testimony did not relate to material issues of fact in this case. It has been noted that the issues in this case presented sharp questions of fact, a most suitable situation for the production of live witnesses for the purpose of resolving the questions of fact.[2]

It must be clear to anyone that the use of written interrogatories would have been completely inadequate, particularly in view of the changes in position taken by respondent from time to time before and during the trial. The testimony of the witnesses was availed of in both trials.

Judge Palmieri allowed traveling expenses of a witness from Beirut, Lebanon, in the sum of $1,531.50 (R. 32-a). Judge Weinfeld allowed traveling expenses for this same witness in the sum of $16.00 (R. 42-a). It seems that there must be some abuse of discretion in one trial judge making an allowance of traveling expenses of $1,531.50 and another judge making an allowance of $16.00 in the same action, with the same issues and with the same witnesses testifying to the same material facts. Both judges, in making any allowance for traveling expenses, concluded that the attend-

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[2] Judge Palmieri, 176 F. Supp. 45, 47 (1959); Judge Palmieri's charge to jury (R. 1364); Judge Weinfeld's charge to jury (R. II-1044); Chief Judge Lumbard, at page A-9 of appendix to petition of Farmer.

ance of the witness was necessary and that his testimony was material.

The ability of petitioner or any other litigant to pay its own costs certainly is not a "defection" for which "a penalty" should be imposed. *Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142 (C. A., 6th Cir., 1959). In *Lichter*, a taxpayer won a large judgment against the Collector of Internal Revenue in an action for a tax refund. The taxpayer had cost "in the approved amount of $2,165.40" but the district judge awarded costs of $5, "expressing the view that since it was a discretionary matter with the Court and the appellant having recovered a huge judgment could amply afford to pay the costs in the case, he was exercising his discretion in the matter and limiting costs to $5." (260 F. 2d at 144, 146). The Honorable Shackelford Miller of the United States Court of Appeals for the Sixth Circuit held that the partial denial of costs on the basis of what the successful litigant could afford was an abuse of discretion.

It is submitted that the serious conflict between this holding and the position of the Court of Appeals, allowing the denial of costs on the basis of relative financial resources, should be resolved in favor of petitioner to obtain uniformity in the application of Rule 54(d) and 28 U. S. C. §1920.

3. The issue raised by the position of the Court of Appeals is not as to the costs available in a suit by a poor person. No apparent attempt was made to change the law relieving a poor person suing in *"forma pauperis"* of certain costs. 28 U. S. C. § 1915. If any such change was contemplated by the Court of Appeals, it is submitted that this is a matter for Congress, not the courts.

What the position of the majority of the Second Circuit does involve is the *relative* financial resources of litigants,

the question posed being whether costs should be denied to the more rich in a suit by the less rich. Fundamental questions in the administration of justice in the federal courts are raised by a holding which will result in the denial of costs to the richer of two litigants merely because of his wealth. The basic American legal concept that "equal justice under the law" is to extend to rich and poor alike seems seriously endangered. It is submitted that any such fundamental and unprecedented change in our legal process as is proposed by the Court of Appeals for the Second Circuit is a matter for Congress not the courts.

4. A reversal of the decision of the Court of Appeals for the Second Circuit is made essential further by the dangerous effect its position will have in encouraging litigation. Professor Moore emphasizes that "The extent to which expenses are allowed as costs can have a significant effect upon encouragement or discouragement of litigation". 6 MOORE § 54.70[2], page 1303 (2nd Ed.).

There can be no doubt that the settlement process will be impeded if costs are awarded on the basis of the relative financial resources of litigants. The poorer litigant, secure in the knowledge that in the Second Circuit he will not be liable for costs, will be encouraged to sue in the Second Circuit and to proceed to litigation on even the most unmeritorious claims. The federal courts in the Second Circuit, already heavily burdened, will be confronted with a new mass of needless litigation.

The fact that a successful defendant may be denied his costs will make it far more likely the poor litigant can obtain a sizable settlement for "nuisance value", and thus will be encouraged to bring unmeritorious actions.

It is submitted the long standing policy of this Court towards encouraging settlements and discouraging strike suits should not be allowed.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: New York, New York,
February 3, 1964.

Respectfully submitted,

CHESTER BORDEAU,
Counsel for Petitioner.

JOHN D. LOCKTON, JR.,
WHITE & CASE,
Of Counsel.

APPENDIX A.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of November, one thousand nine hundred and sixty-three.

Present:

Hon. J. EDWARD LUMBARD,
Chief Judge,
Hon. CHARLES F. CLARK,
Hon. STERRY R. WATERMAN,
Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Hon. IRVING R. KAUFMAN,
Hon. PAUL R. HAYS,
Hon. THURGOOD MARSHALL,
Circuit Judges.

HOWARD FARMER,
Plaintiff-Appellant,

v.

ARABIAN AMERICAN OIL COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court as to the determination of costs incurred in the trial before Hon. Edward Weinfeld, U. S. D. J., be and it hereby is affirmed but as to the costs taxed by Hon. Edmund L. Palmieri in the first trial, said order be and it hereby is reversed and that the action be and it hereby is remanded with instructions to tax costs in accordance with the opinion of this court with costs to the defendant-appellant.

A. Daniel Fusaro,
Clerk.

APPENDIX B.

Statutory Provisions.

28 U. S. C. § 1821

CHAPTER 119—EVIDENCE; WITNESSES

§ 1821. Per Diem and mileage generally; subsistence

A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Regardless of mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $8 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided,* That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further,* That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day. As amended Oct. 31, 1951, c. 655, § 51(a), 65 Stat. 727; Sept. 3, 1954, c. 1263, § 45, 68 Stat. 1242; Aug. 1, 1956, c. 826, 70 Stat. 798.

RULE 54(d) FEDERAL RULES OF CIVIL PROCEDURE

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

28 U. S. C. § 1920

§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955.